

**Before the Appellate Tribunal for Electricity  
(Appellate Jurisdiction)**

**Appeal No. 09 of 2008**

**Dated: May 9, 2008.**

Present: Hon'ble Mr. H.L. Bajaj, Technical Member  
Hon'ble Mrs. Justice Manju Goel, Judicial Member

Karnataka Power Transmission Corporation Limited  
Kavery Bhawan, K.G. Marg  
Bangalore-560009 ...Appellant(s)

Versus

Karnataka Electricity Regulatory Commission  
6<sup>th</sup> and 7<sup>th</sup> floors  
Mahalakshmi Chambers  
9/2, M.G. Road  
Bangalore-560001 ....Respondent(s)

Counsel for appellant :Mr. M.G.Ramachandran,Advocate  
Mr. Anand K.Ganeshan,Advocate  
Ms Swapna Seshadri,Advocate

Counsel for respondent : No appearance

**Judgment**

**Per Hon'ble Mr. H.L. Bajaj, Technical Member.**

This appeal filed by KPTCL against the Order dated 31.12.2007 passed by the Karnataka Electricity Regulatory Commission (KERC or the Commission in short) in regard to

the determination of transmission tariff of the Appellant, Karnataka Power Transmission Corporation Limited ( KPTCL in short ) for the period FYs 2007-08, 2008-09 and 2009-10, pursuant to the directions contained in the order dated 4.12.2007 passed by this Tribunal in Appeal No.100 of 2007 and IA No.122 of 2007.

2. The main issue in this appeal relates to adjustments carried out by the Commission by reopening the truing up exercise already undertaken for the earlier tariff periods 2000-01 to 2005-06 while giving effect to the direction of this Tribunal to allow the additional power purchase cost of M/s Tanir Bhavi Power Corporation Limited (Tanir Bhavi or TBPC in short). By such truing up of the past years the Commission, it is alleged, has fully adjusted additional cost of such power purchase to be allowed to KPTCL and has further proceeded to find a surplus with KPTCL.

2. Gravamen of KPTCL in the present appeal relates to the Commission not allowing the cost of power purchases made by

KPTCL from M/s Tanir Bavi in the spirit of the orders passed by this Tribunal. In addition to the above, KPTCL has also raised certain issues concerning depreciation, O&M charges, interest and finance charges and the Commission not undertaking the required truing up for the financial year 2006-07.

4. Brief facts leading to this appeal are given below:

5. On 20.4.2006, the Commission had passed an order on a petition filed by KPTCL and the Distribution Companies in the Karnataka, wherein, they had sought for revision of tariff relating to the tariff for the years 2000-01 to 2003-04 on account of additional power purchase cost payable to M/s Tanir Bavi. KPTCL and the Distribution Companies had claimed the additional power purchase cost paid by them to Tanir Bavi based on an award dated 19.5.2003 made by an Arbitration Tribunal comprising of three Hon'ble former Judges of the Hon'ble Supreme Court of India. By the award dated 19.5.2003, the Hon'ble Arbitration Tribunal held that the KPTCL, which was a successor company of Karnataka

Electricity Board (which had entered into the power purchase agreement with Tanir Bavi) was obliged to pay tariff at the rate of US 4 cents per kWh.

6. Despite the Arbitration Award dated 19.5.2003, the Commission did not recognize the liability of KPTCL to pay US 4 cents for the power purchased from Tanir Bavi for the period FY 2000-01 onwards. The Commission restricted the tariff for such power purchases at US 1.946 cents in the order dated 20.4.2006 as was earlier allowed before the award and did not allow any revision.

7. By the time the above order dated 20.4.2006 was passed, the Commission had already from time to time undertaken the truing up of financials of KPTCL for the years 2000-01 to 2003-04 based on audited accounts of KPTCL. The Commission had then found a deficit/surplus of the following amounts in the Revenues of KPTCL for the above period:

(Rs in crores)

YEAR	AMOUNT OF DEFICIT/SURPLUS
2000-01	- 601.01
2001-02	- 22.31
2002-03	+ 49.45
2003-04	+ 93.97
AGGREGATE	- 479.9 (minus)

8. Aggrieved by the above Order dated 20.4.2006, KPTCL and the distribution companies had filed an Appeal, being Appeal No. 107 of 2006 before this Tribunal. By order dated 19.10.2006, this Tribunal allowed the appeal No.107 of 2006 and declared that KPTCL and the distribution companies are entitled to be allowed the entire power purchase cost payable to Tanir Bavi as per Arbitration award as a pass through in their tariff. In the above appeal, this Tribunal had framed the following issues after hearing the parties:

*“18. In this appeal the following points arise for consideration:*

- (A) Whether the disallowance of full fixed charges payable by KPTCL in terms of the arbitral award by the State Commission, is sustainable?*
- (B) Whether the claim of KPTCL to include the difference in fixed charge, it is liable to pay as per award, in the ARR and consequently pass on same to the consumers through tariff, is legally sustainable?*
- (C) Whether the State Regulatory Commission has acted with illegality and material irregularity in rejecting the claim of appellants to pass through the additional payment made by it to M/s. Tanir Bhavi in terms of binding arbitral award?*
- (D) Whether the decision of KPTCL to accept the arbitral award in any way reflects on KPTCL? and whether the KPTCL has acted bonafide and reasonably in accepting the award without preferring an appeal challenging the award?*
- (E) To what relief, the parties are entitled to? “*

9. The operative part of the order dated 20.4.2006 read as under:

*“41. In the light of our discussions the various contentions advanced by the respondents are not sustainable and the view of the Karnataka Electricity Regulatory Commission, cannot be sustained legally and deserves to be reversed as it is a misdirection and illegality.*

42. Hence on point A, we hold that the disallowance of full fixed charges payable/paid by the appellant in terms of the arbitral award, by the State Commission is liable to be reversed and charges claimed deserve to be allowed. On point B, we hold that the appellants are entitled to include the difference in fixed charges in the ARR, which, it is liable to pay as per the award and included and the same has to be passed on to the consumers through tariff. On point C, we hold that the view of Regulatory Commission in disallowing the claims of the appellants is not only a misdirection, but also an illegality. Hence the entire claim of the appellants deserved to be sustained. On point D, we hold that the acceptance of the arbitral award without any further challenge by the appellants, in no manner reflects on the managerial and commercial decision taken by the appellant and we do not find any want of bonafides in this behalf.

43. In the result, the appeal deserves to be allowed and we direct the first respondent Commission to allow the claim of the appellant as prayed for, with a consequential direction that the said liability can be passed on to the consumers through tariff. However, as such a direction to include the past arrears, may result in steep increase in tariff, it would be eminently fit and proper to direct KPTCL to create regulatory asset to the value of the differential amount payable by it for five years, which the appellants are liable to pay to M/s. Tanir Bhavi and amortize the same by gradual increase of tariff in the course of next five years or so sooner thereof as the financial position may warrant.”

10. Pursuant to the above, in the Annual Revenue Requirements filed by KPTCL before the Commission for the period FYs 2007-08 to 2009-10, KPTCL claimed the above additional cost to be paid/payable to Tanir Bavi to be adjusted in the tariff.

11. By order dated 6.7.2007, the Commission decided the petition filed by KPTCL. In the order, the Commission undertook afresh truing up of KPTCL's financials for the tariff period 2000-01 till 2005-06, despite such truing up having been already carried out earlier. By such truing up, the Commission concluded that KPTCL has a surplus of Rs. 738.23 crores in the sales revenues and adjusted the various costs claimed by KPTCL including the additional power purchase cost of Rs. 545.87 crores paid/payable to Tanir Bavi as per the judgment of this Tribunal dated 19.10.2006.

12. Aggrieved by the above order dated 6.7.2007 on the aspect of truing up undertaken afresh to adjust the additional power purchase cost for purchases from Tanir Bavi as well as



certain other aspects, KPTCL filed an Appeal being Appeal No.100 of 2007 before this Tribunal.

13. By order dated 4.12.2007, this Tribunal allowed the appeal filed by KPTCL and set aside the order dated 6.7.2007 passed by the State Commission and directed the State Commission to re-determine the tariff based on the decision of this Tribunal. The operative part of the order dated 4.12.2007 is as under :

*“28. We have heard contentions of the rival parties. Basic issue that has to be decided is: whether or not the Commission was correct in carrying out the truing up of revenue requirements and revenues of KPTCL for the tariff period 2000-01 to 2005-06. Invariably, the projections at the beginning of the year and actual expenditure and revenue received differ due to one reason or the other. Therefore, truing up is necessary. Truing up can be taken up in two stages: Once when the provisional financial results for the year are compiled and subsequently after the audited accounts are available. The impact of truing up exercises must be reflected in the tariff calculations for the following year. As an example; truing up for the year 2006-07 has to be completed during 2007-08 and the impact thereof has to be taken into account for tariff calculations for the year 2007-08 or/and 2008-09 depending upon the time when truing up is taken up. If any surplus revenue*

*has been realized during the year 2006-07, it must be adjusted as available amount in the Annual Revenue Requirement for the year 2007-08 or/and 2008-09. It is not desirable to delay the truing up exercise for several years and then spring a surprise for the licensee and the consumers by giving effect to the truing up for the past several years. Having said that, truing up, per se, cannot be faulted, and, therefore, we do not want to interfere with the decision of the Commission in this regard to cleans up accounts, though belatedly, of the past. It is made clear that truing up stage is not an opportunity for the Commission to rethink de novo on the basic principles, premises and issues involved in the initial projections of revenue requirements of the licensee.....*

*29. It is noted that the Commission had been carrying out the truing up exercises on year to year basis but had not given effect to the results of such exercises during all these years. Once the truing up exercise has been carried out, the Commission is not permitted to again take up the truing up exercise based on new assumptions.*

*30. It has been brought to our notice that whereas the Commission, in the first truing up exercise, had found a deficit of Rs. 479.9 crores, second truing up exercise by the Commission has resulted in sufficient surplus in the revenues of KPTCL to not only wipe out the deficit of Rs. 479.9 crores but also adjust an amount of Rs. 545.87 crores which this Tribunal had directed to allow on account of difference in power purchase cost paid to Tanir Bhavi. The main reason for this disparity, it has been contended by the appellant, is on account of treatment of Transmission and Distribution losses.*

31. We now advert to the T&D losses. The Commission is expected to fix the T&D loss targets in consultation with the licensee. Once the target for loss level is fixed, the licensee is expected to make all efforts to achieve the loss level. The consumers should not be made to bear the brunt of losses over and above the fixed target. In the case in hand, during one year, a loss level of 31% is fixed by the Commission. The cost of 100 units purchased and 69 units (100-31) sold should be considered in the ARR. However, KPTCL could achieve only 35.5% loss level which means that units required to be purchased will be about 107 so that 69 units are available for sale to the consumers. Whereas the Commission has allowed the cost of procurement of power of about 107 units, simultaneously by applying a loss level of 31% to 107 units, it has also assumed that there will be sale of about 5 units over and above the 69 units. This results in recovering from the licensee for the electricity which has not actually been sold because of losses being 35.5% (actuals) against the set target of 31%. The additional imaginary sale of power assumed by the Commission is irrational, unreasonable as this electricity has not even reached the consumer end.

32. We need to balance the interest of the consumer and the licensee by ensuring that the licensee tries his best to achieve the said targets and is deterred to under achieve loss reduction. In the present case to sell 69 units KPTCL will be allowed purchase cost of 100 unit only as per the target of 31% set by the Commission and the licensee will have to pay for the power required over and above 100 units so that 69 units are sold to consumers. We decide that this deterrent of disallowing cost of electricity required over and above 100 units is sufficient and it will not be correct to assume an imaginary sale of electricity when the actual loss level is 35.5% and when the

*licensee has already been penalized by not allowing it the cost of power procurement over and above 100 units. This will ensure that the licensee functions efficiently. Interest of consumers is not prejudiced because licensee is being allowed only purchase cost of power as per the loss level target set by the Commission.*

*The question before us is how much of power can be deemed to have been sold and what amount should be taken as the revenue from the sale of power. The Commission cannot be allowed to assess the revenue of the licensee on the imaginary sale of power as indicated above. The licensee has borne the burden of extra purchase of power for meeting the T&D loss over and above the target. The revenue of the licensee can be assessed only on the basis of actual sale. We, accordingly, uphold the objection of the appellant on this aspect and allow the appeal in respect of issues A&B.*

*Concedingly, the Commission has taken into account the additional power purchase cost payable to Tanir Bhavi as allowed by this Tribunal in appeal No. 107 of 2006. We direct that this element of additional cost may be succinctly reflected by the Commission while implementing this order.”*

14. In the above order dated 4.12.2007, this Tribunal also considered certain other aspects raised by KPTCL, namely, interest and finance charges , non-truing up of finances of KPTCL for the period 2006-07. On the issue of interest and finance charges, this Tribunal held as under :

*“39. In view of the above judgment of this Tribunal the payments of interest and finance charges, pending final approval of the Commission, are merely provisional payments and, therefore, the Commission need not discontinue its decades old practice of allowing the interest and finance charges to the licensee till capitalization of the assets. If there is any variation in the expenditure made by the appellant and the approval accorded by the Commission, adjustments can always be made. Moreover, if the interest payments are not allowed till capitalization then the Interest During Construction will also form a part of asset base and for the useful life of the asset the return on the equity portion will be allowed to the licensee and this will not be in the interest of the consumer. It will therefore, be just, fair and equitable to continue to allow the interest and finance charges to the appellant as per Commission’s well established practice and make required adjustments at the time of capitalization of assets as approved by the Commission. We order accordingly.”*

15. On the issue of truing up of financial years 2006-07, the

Tribunal held as under:

*“46. This Tribunal in its judgment dated May 23, 2007 in appeal No. 269/06, Poddar Alloys vs. Uttaranchal Electricity Regulatory Commission has held that the truing up exercise should be taken up in two stages: firstly on the basis of the available data and information and secondly and subsequently truing up exercise can be taken up when Audited Accounts are available. We order accordingly. The Commission is directed to immediately take up the truing up exercise and decide tariff which should form the base line for the MYT.”*

16. It is alleged that despite the above, in the impugned order dated 31.12.2007, the Commission has again proceeded to undertake the truing up of the revenue requirements of KPTCL from the financial years 2000-01 to 2005-06 based on certain new assumptions. The Commission has also decided certain other issues on the interest and finance charges, depreciation and O&M charges, all relating to the revenue requirements and tariff for the period FYs 2007-08 to 2009-10.

17. The grievance of KPTCL in the appeal has been that the truing up undertaken by the Commission, of the finances for the period from 2000-01 to 2005-06 is contrary to the order passed by this Tribunal dated 4.12.2007 and is also based on new assumptions which are factually wrong, contrary to the accounting, as well as regulatory process of tariff determination.

18. Submissions of KPTCL on various issues raised are as under:

19. **ISSUE 1: TRUING UP OF THE FINANCES FOR THE PERIOD FROM 2000-01 TO 2005-06, KPTCL.**

- A.** The Commission has, for the Financial year 2002-03, in the truing up exercise revised the approved expenses and the approved revenues, which is totally unjustified and without any purpose. The only objective for the same seems to have been to show an adjustment against costs to be allowed as per the directions of this Tribunal. By such exercise, the Commission has added an aggregate amount of Rs. 183.29 crores for the Financial Year 2002-03 to the approved revenue requirements of KPTCL which has been adjusted against the Tanir Bhavi cost to be allowed by the Commission. The reason given by the Commission that KPTCL undertook the business of Distribution and Retail sale of electricity for two months in FY 2002-03 has no rationale as any impact of the same would only be in the actual expenditure and not the approved expenditure. Moreover, there has

been no such revision at any time in the past and only when the Commission was required to allow the Tanir Bhavi Power Purchase Cost, the Commission has done such revision to arrive at a surplus to adjust such power purchase cost.

- B.** In addition to the above, the Commission has adopted the cost and expenses related to the financial years 2000-01 to 2005-06 which is illogical, irrational and capricious. The Commission has, on the basis of assumed and derivative figures, once again and on the basis of a new assumptions and methodology adjusted the power purchase cost to be allowed to KTPCL for the said financial years. The Commission has adjusted the loss level in an illogical manner so as to arrive at a surplus for KTPCL in the fresh truing up exercise. In the above context, KPTCL has stated as under:

“W. In addition to the above the State Commission has adopted a methodology to adjust costs and expenses related to the six financial years namely



2000-01 to 2005-06 which is illogical, irrational and capricious. For example for the financial year 2000-01 the State Commission had assumed that 1807 MUs out of total quantum of power purchase of 27,700 ought to be disallowed and the disallowance in terms of reduction in the power purchase cost would be 1807 MUs multiplied by pooled rate of Rs 1.36 per kwh which works out to Rs 245.29 Crs. This has been derived based on sale of 17867 MUs instead of approved sale of 18766. The correct and simple method for dealing with the variation in power purchase quantum to be considered is as under:

- i. The Approved Power Purchase quantum is 27197 MUs.
- ii. The Actual Power Purchase quantum is Rs 27700 MUs.
- iii. The variation in power purchase in quantum to be considered should begin with and based

on actual quantum of power purchase of 27700 which is a real item and not a derivative or notional item.

- iv. The sale quantum as per audited accounts mentioned in row 1 of Table 1 of the impugned order dated 31.12.07 comprised of Metered sale and also un-metered sale. The un-metered sale consists of sale to agricultural pump set and the quantum is an estimate only. There is therefore an overlapping between un-metered sale and losses and it is always difficult to determine correctly the percentage of un-metered sale and percentage of losses. Thus the sale of 17867 MUs mentioned in row 1 and loss of 9834 MUs mentioned in row 2 of Table 1 are to certain extent inter changeable because of estimation of un-metered sale. The sale of 17867 MUs cannot therefore be a

correct basis for deciding on the variation in power purchase in MUs to be considered.

- v. Accordingly so long the quantum of actual power purchase is more than quantum of power purchase approved no adjustments in the quantum of power purchase need to be carried out.
- vi. Without prejudice to the above even if any adjustment is to be carried out ignoring the mixing up of un-metered sale and losses, the variation should be derived from actual quantum of power purchase of 27700 MUs and not from any other derivative numbers.
- vii. The actual quantum of power purchase of 27700 is to be adjusted for three elements namely:

1. Sales

2. Loss Level allowed;

### 3. Loss level not allowed.

- viii. In accordance with the above, out of 27700 the loss level of 4.50% which is in excess of 31% approved loss level ought not to be allowed. This means 1246.50 MUs should be reduced from 27700 and the balance quantum of 26453.50 MUs of power purchase should be allowed. This 26453.50 MUs is the power purchase to be allowed with 31% loss level.
- ix. Instead of the above 26453.50 MUs the State Commission has considered only 25894 MUs as the quantum of power purchase to be allowed by adopting a reverse calculation and giving cumulative and double effect.
- x. The fallacy in the approach adopted by the State Commission in the calculation is writ large in Table 1 itself where the State Commission has taken 25894 out of 27700 MUs as admissible power purchase quantum

which would mean 1806 MU or 1807 MU which the commission has mentioned in row 6 to be disallowed as additional losses for excess of 4.50% above 31%. This 1806 constitute 6.97% of 27700. Thus the State Commission has penalized KPTCL for more than 4.50% and has implemented a loss level of 28.53% instead of 31%.

Similar obvious mistakes exist in many of the calculations leading to the wrong conclusion that upon truing up there will be surplus in the hands of KPTCL even after adjusting Tanir Bhavi costs which was previously disallowed and now purported to be allowed because of the order dated 4.12.2007 passed by the Tribunal in Appeal No 100 of 2007.”

- C.** The entire attempt made by the Commission in the impugned order is to perpetuate the earlier attempt made in the Order dated 6.7.2007, namely, that

KTPCL should not get the additional cost for power purchase which KTPCL had legitimately incurred towards Tanir Bhavi power but was not allowed by the Commission. As the Tribunal had found such disallowance to be not correct and directed the Commission to allow the same, an attempt was first made to show artificially increased sales revenue to set off the additional cost and when this was set aside by the Tribunal the Power Purchase Cost and expenses are now artificially lowered so that it can be shown that KPTCL has an overall surplus even after adjustment of the amount of Rs 545. 87 crores for additional cost for power purchase from M/s Tanir Bhavi.

20. **ISSUE 2: DEPRECIATION AND O&M EXPENSES:**

21. KPTCL has submitted that the Commission has not included the assets proposed to be established during the control period FYs from 2007-08 to 2009-10 for the purposes of calculating the depreciation and O&M cost, while including

such assets in the interest and finance charges for the same period. KPTCL has submitted that the above is without any justification whatsoever. The Commission has also not given any reason whatsoever in support of the above decision.

22. **ISSUE 3: INTEREST AND FINANCE CHARGES.**

23. KPTCL submitted that the Commission has just adopted an average interest of 8.5% ignoring the interest proposed by KPTCL in the petition filed before the Commission based on the actual loan sanctioned etc. to KPTCL.

24. **ISSUE 4: TRUING UP FOR FY 2006-07**

25. KPTCL has also contended that the Commission has not undertaken the truing up for the period FY 2006-07, which the Commission ought to do as per the established practice.

26. Despite notice of the appeal, was duly served on the Commission, there was no appearance on behalf of the Commission in the present appeal. Though in the earlier

appeal filed by KPTCL, the Commission was represented through counsel and officers of the Commission. However, the Commission, vide letter dated 12.2.2008, had forwarded to this Tribunal an affidavit giving its comments on the points raised by KPTCL in challenging the order dated 6.12.2007 passed by the Commission. The affidavit inter alia reads as under:

2. *The Appellant has raised among other things, the following issues while challenging the order dated 31.12.2007 passed by the Commission:*

- 1) *Truing up of ARR of the past period.*
- 2) *Modification of approved figures for FY03.*
- 3) *Treatment of losses & Power purchase quantum and costs.*
- 4) *Tanir Bavi claims*
- 5) *Interest and Finance charges, depreciation etc.*

3. *The Commission would like to respectfully submit its response to the above issues as follows :*

- 1) *Truing up: The Hon'ble ATE has upheld the Commission's decision to undertake truing up exercise in its order dated 4.12.2007. In page No.23 to 26 of the appeal, the Commission has reproduced the decision of the Hon'ble ATE. The Appellants having accepted the said decision of the Hon'ble ATE, are again questioning the wisdom of the said decision of the Hon'ble ATE. In the truing up exercise the Commission has adopted the principles laid down by the Hon'ble ATE.*
- 2) *Modification of approved figures for FY03: The Commission has explained the reasons for modifying the*



*approved figures for FY03 in respect of the KPTCL in page 33 of the appeal. There is no modification of the approved figures for the other years.*

- 3) *Treatment of losses, power purchase quantum and costs: The Commission has complied with the principles laid down by the Hon'ble ATE in its order dated 4.12.2008 in Appeal No.100 of 2007. In page 25 of the appeal, the decision of the Hon'ble ATE has been reproduced, which clearly shows that for sale of 69 units, the appellant has been allowed purchase of 100 units taking into consideration 31% loss target set by the Commission. The Appellant has to bear the cost of losses over and above the fixed target of 31%. The sales figures considered for truing up are as per audited accounts of the Appellant and not estimated figures. The calculations worked out by the appellants, therefore, are against the principles laid down by the Hon'ble ATE.*
  - 4) *Tanir Bavi claims: The Hon'ble ATE in the order dated 4.12.2007 in Appeal No.100 of 2007 have concluded that, the Commission has taken into account the additional power purchase cost payable to Tanir Bavi Company. The decision is reproduced at page 26 of the appeal. The appellant is therefore trying to mislead the Hon'ble ATE.*
  - 5) *Interest and Finance charges, depreciation etc.: The Commission has considered the proposed Capex in full for the purposes of computation of interest and the details have been discussed in page 45 and 46 of the appeal.*
5. *The Commission would like to submit that the appellants have raised only the factual issues, which could have been sorted out through a review petition before the Commission. The Commission is open to consider and correct the factual errors and omissions, if any. Instead the appellant have come before this Hon'ble Tribunal seeking stay of the Commission's order which is passed in compliance with the order of this Hon'ble Tribunal in appeal No.100/2007. The appellant has no intention to implement the order of the Commission which is*

*passed, applying the principles laid down by the Hon'ble Tribunal in appeal No.100/2007.*

6. *It is therefore respectfully submitted that this Tribunal may be pleased to reject the appeal filed by the appellant with a direction to approach the Commission to set right the factual errors, if any, through a Review petition, if deemed necessary.*

27. Learned counsel appearing for KPTCL has contended that the appellant has been compelled to make serious allegations of motivation, perverse, legal malafide capricious etc in regard to the Order dated 31.12.2007 passed by the Commission as the Commission has not been implementing the Orders passed by this Tribunal in regard to the differential cost of USD 2.054 cents in the power purchased from Tanir Bhavi by KPTCL. Firstly, the Commission did not allow such cost pending KPTCL taking steps to raise arbitration disputes against Tanir Bhavi. At that time, the Commission did not find any surplus in regard to the revenue requirements for the period 2000-01 onwards. Thereafter, the Commission did not allow the differential cost despite the Award given by the three Hon'ble former Judges of the Hon'ble Supreme Court of India. At this stage also the Commission did not find any surplus in the hands of KPTCL for the period 2000-01 onwards. On the

other hand, the Commission had found an aggregate deficit in the revenue requirements of KPTCL for the period 2000-01 to 2004-05 in the sum of Rs 479 crores. However, after the Order dated 19.10.2006 was passed by this Tribunal in Appeal No. 107 of 2006 directing the Commission to allow power purchase cost payable by KPTCL to Tanir Bhavi as a pass through in the tariff in the entire USD 4 cents, the Commission undertook truing up afresh for the financial years 2001 onwards and found a surplus of Rs 583.30 crores (as against a deficit of Rs 479 crores previously found) by the Commission.

28. Learned counsel averred that by Order dated 4.12.2007 the Tribunal found that the methodology adopted by the Commission for determining such surplus was wrong and was not justified and, therefore, the Commission was directed to undertake truing up to allow the cost of Tanir Bhavi power purchase with carrying cost in the future tariff. In the Order dated 4.12.2007 this Tribunal in Para 29 had specifically stated that once the truing up exercise has been carried out,

the Commission is not permitted to again take up truing up exercised based on new assumption. However, as observed this Tribunal has stated that the Tribunal was not against truing up. The Commission had ignored the conclusion of the Tribunal at Para 29 of the Order and by relying on the passing observation by this Tribunal had again undertaken truing up for the year 2000-01 to 2005-06 based on new assumptions. He alleged that this has been done, according to KPTCL, specifically to deprive the benefit of the Order of this Tribunal in favour of KPTCL in regard to allowing the Tanir Bhavi power purchase cost with interest. Accordingly, a sum of Rs. 545.87 crores was to be allowed in favour of KPTCL towards principal and KPTCL was also entitled to the carrying cost at the rate of 12% per annum.

29. Mr. M.G. Ramachandran submitted that to avoid further complications and to protect the interest of KPTCL, this Tribunal should direct that the entire power purchase cost of Rs 545.87 crores (being the additional cost paid/payable by KPTCL) with carrying cost of 12% should be allowed without

any further truing up of the financial years 2000-01 to 2005-06.

30. Taking into account various submissions made by KPTCL and the Commission and hearing various contentions advanced by the appellant, the issues which arise for our consideration in the present appeal are:-

- (a) Whether the Commission was right in undertaking the truing up of the revenue requirements of KPTCL for the financial years 2000-01 – 2005-06 under the impugned Order dated 31.12.2007 so as to find a surplus revenue and thereby adjust an amount of Rs 545.87 crores on additional cost of power purchase from Tanir Bhavi, admittedly, payable as per the Award and as per the earlier decision of this Tribunal?
- (b) Whether the Commission has undertaken the determination of the revenue requirements under the truing up exercise based on new methodology or otherwise there is any merit in the adjustments made

by the Commission to arrive at a surplus of Rs 583.30 crores?

- (c) Whether the Order of the Commission on the issues relating to depreciation, O & M charges and interest on finance charges is correct?

### **ANALYSIS AND DECISION**

#### **Issue No. 1: Truing up of the Finances for the period from 2000-01 to 2005-06, KPTCL**

31. The Commission has proceeded on the basis that it is entitled to undertake truing up for the financial years 2000-01 to 2005-06 by virtue of the observations contained in Para 28 of the Order dated December 04, 2007. In the above part of the Order, this Tribunal had observed that the truing up per se cannot be faulted and, therefore, the Tribunal does not want to interfere with the decision of the Commission in this regard in order to clean up accounts of the past though belatedly. We reiterate that the truing up stage is not an opportunity for the Commission to re-think de-novo on the basic principles, the premise and issues involved in the initial projections of the revenue requirements of the licensee and

that once the truing up exercise has been carried out, the Commission is not permitted to again take up the truing up exercise based on new assumption. We had specifically dealt with the case of KPTCL where the Commission had been carrying out the truing up exercise on year-to-year basis and had not given effect to the results of such exercise during all these years. Therefore, the Commission was neither required nor authorized to undertake the truing up afresh, particularly, based on new assumptions or new processes or new methodology. The Commission could have trued up based on the audited figures, if the earlier exercises were done on provisional basis.

32. In case of NDPL vs DERC, in Appeal No. 265 of 2006, the appellant (NDPL) had contended that second truing up is warranted only when there is difference between the provisional accounts on the basis of which the first truing up is done and audited accounts, which may have been furnished after such truing up.

33. We consider it necessary to set out below the relevant extract from this Tribunal's judgment of May 23, 2007 in Appeal No. 265 of 2006:

*60. Before parting with the judgment we are constrained to remark that the Commission has not properly understood the concept of truing up. While considering the tariff petition of the utility the Commission has to reasonably anticipate the revenue required by a particular utility and such assessment should be based on practical considerations. It cannot take arbitrary figures of increase over the previous period's expenditure by an arbitrarily chosen percentage of 4% or 20% and leave the actual adjustments to be done in the truing up exercise. The truing up exercise is mentioned to fill the gap between the actual expenses at the end of the year and anticipated expenses in the beginning of the year. When the utility gives its own statement of anticipated expenditure, the Commission has to accept the same except where the Commission has reasons to differ with the statement of the utility and records reasons thereof or where the Commission is able to suggest some method of reducing the anticipated expenditure. This process of restricting the claim of the utility by not allowing the reasonably anticipated expenditure and offering to do the needful in the truing up exercise is not prudence. In any case, the method adopted by the Commission has not helped either the consumer or the utilities. It can only be expected that the Commission will properly understand its role in assessing the revenue requirement of the utility and in*



*determination of the tariff in accordance with the policy directions and the relevant law in force.*

34. In the present case admittedly there has not been any substantial change between the provisional accounts and the audited accounts on all the three scores the Commission has done the second truing up on the basis of revised policy which is not permissible as per above judgment.

35. For the financial years 2000-01 to 2003-04 the aggregate deficit found by the Commission was of Rs. 479.09 crores. Now adopting a new approach the Commission has discovered a surplus of Rs. 738.23 crores as against the deficit earlier found and thereby providing for an adjustment on account of additional Power Purchase Cost of Tanir Bhavi of Rs. 545.87 crores. Commission's order clearly shows that it has found a new methodology and process to undertake truing up. Truing up exercise has to be done with reference to the amounts approved and the actual figure. The Commission has changed the approved figure of Rs. 183.29 crores for the revenue requirements for the year 2002-03 for the purpose of truing up and that too on a second attempt. This was not permitted by

the Tribunal in its order dated December 04, 2007. Such an approach is against the essence of true-up exercise: True up exercise is meant to fill the gap between the actual expenses and revenues estimated at the end of the year and anticipated expenditure and revenue at the beginning of the year.

36. The Commission has erred in its assessment of power purchase quantum to be considered for the purpose of revenue requirement for the relevant year FY 2000-01 to FY 2005-06. While arriving at the quantum of power purchase to be allowed for revenue requirement, KERC should first reduce the disallowed T&D losses from the quantum of power purchase entered in the audited accounts of KPTCL. From the figure so arrived, the Commission has to reduce the allowed T&D losses which will give the quantum of power available for sale yielding revenue. Moreover, KERC has to realize that the audited sale quantum includes metered sale and unmetered sale which also includes agricultural pumping sets and, therefore, there is an overlapping between the unmetered sale and loss. In this view of the matter, we are of the opinion that

calculations should be carried out on the basis of the methodology given by KPTCL in its Memo of Appeal at para 'W'. We order accordingly.

**Issue No. 2: Depreciation and O&M Expenses.**

37. The appellant has rightly claimed the depreciation and O&M charges during the MYT period 2007-08 to 2009-10 as and when the assets created are put into use. There is no reason why such newly created assets during the MYT period are not included for the purpose of determination of depreciation and O&M expenses. We, therefore, order that all the assets including those new assets which will be established during the control period of 2007-08 to 2009-10 must be treated as eligible for the purpose of determination of depreciation and O&M charges. We order accordingly.

**Issue No. 3: Interest and Finance Charges.**

38. It is not understood how the Commission has considered an interest rate of 8.5% when figures for the actual loans advanced/sanctioned to KPTCL were available with it. In the

cost plus regulatory regime all reasonable costs including the actual rate of interest on loan have to be allowed to KPTCL. We order accordingly.

**Issue No. 4: Truing up for FY 2006-07**

39. KERC is also directed to immediately undertake the truing up exercise for the year FY 2006-07.

40. In view of the aforesaid discussions and analyses, the issues at (a), (b) and (c) above are decided in favour of KPTCL.

41. The finding of the Commission that there is a surplus of Rs. 738.23 crores is set aside and, therefore, the amount of Rs. 545.87 crores with carrying cost of 12% being the additional Power Purchase Costs to be allowed for Tanir Bhavi, as per the earlier order, cannot be said to be adjusted in surplus and, therefore, KPTCL should allow the same in the tariff immediately without providing for any adjustment for the FY 2001-02 to 2005-06. In the result the appeal is allowed.

42. Before parting, we have to regretfully say that we have been observing that the Commission has been articulative in

avoiding implementation of the Tribunal orders in one way or the other and the rightful claims of the appellant have been denied to him for long time by giving different meanings to our orders. We have been leaving it to the Commission to implement our orders and revise the tariff in the light of the directions given therein having full trust in the Commission that our orders will be meticulously implemented without demure. This kind of approach adopted by the Commission deters investments in the power sector. The objective behind the reforms in the electricity sector was to enhance generation, transmission and distribution capacities by attracting capital from all sources while protecting the consumers against exploitation by creating the mechanism of Regulators. The Regulators are intended to be autonomous bodies free from Government interventions and expect to perform their duties within the framework of the law. They are quasi judicial bodies and have to adhere to judicial discipline. The attitude betrayed by their repeated attempts to bypass the dictum of this Tribunal is not conducive to the growth of the sector since an overjealous efforts to keep tariff low at the cost of capital

might threaten capital and cause a capital flight from the power sector. Such attitude leads to litigation and consequent waste of public money and public time. We hope that the Commission would keep the aforementioned in mind in its future operations.

43. Appeal and IA disposed of.

No costs.

(Mrs. Justice Manju Goel)  
Judicial Member

( H. L. Bajaj)  
Technical Member